Associated Pan Malaysia Cement Sdn Bhd v Westwood Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S-22NCVC-96 OF 2011
AMELIA TEE ABDULLAH JC
8 JULY 2011

Land Law — Trespass — Encroachment on land — Boundary of plaintiff's land disputed — Whether defendant's proposed development encroached onto plaintiff's land — Plaintiff's boundary demarcation survey plan approved by Director of Survey and Mapping — Whether approval conclusively determined boundary of land — National Land Code s 396(2)

The plaintiff was the lessee of a quarry ('the land') and had obtained a 21 years lease from the state authority to mine on the land. The plaintiff's boundary demarcation survey plan for the land was approved by the Director of Survey and Mapping, Selangor ('DSMS') following which a new lot number was assigned to the land and the area enclosed by its boundaries was calculated to be 128.6 hectares. Meanwhile, the defendant had submitted to the authorities for approval a plan for a housing development project ('the project') next to the plaintiff's land. The plaintiff requested the defendant to withdraw the development plan as it showed the project would trespass into the southern boundary of the land. As the plaintiff was carrying out mining works on the land, it was concerned that if the defendant's project went ahead at the boundary without the necessary buffer zone, the residents' livelihood would be affected and this would, in turn, affect the plaintiff's quarry operations. The defendant's response to the plaintiff's request was that its development plan had already been approved and that the boundaries of the land had not been finalised. The plaintiff filed an action for a declaration that (i) the new southern boundary of the land was as per the plaintiff's demarcation survey plan as approved by the DSMS, and that (ii) the defendant's proposed development encroached into the boundary of the land. The plaintiff also sought an injunction to restrain the defendant from proceeding with the project.

Held, allowing the prayer:

(1) Section 396 of the National Land Code ('the Code'), especially sub-s (2) thereof, stated that any plan approved by the DSMS under para (e) of sub-s (1) shall be conclusive evidence of the boundaries, boundary marks and area of the land to which it referred and was prima facie evidence of the lot number thereof (see para 44).

(2) Notwithstanding the fact the state authority may have approved the

defendant's land application, the said approval would not have the effect of changing the boundaries of the plaintiff's land as approved by the DSMS (see para 44).

(3) As no evidence was adduced by the defendant to show that the plaintiff's survey plan had ever been amended by the DSMS under s 396A of the Code, the survey plan would be the authoritative and conclusive survey plan that set out the boundaries of the plaintiff's land (see para 46).

(4) The plan relied upon by the defendant was a land application plan and not a development plan. There was no evidence the area in dispute had been alienated to the defendant, nor was there evidence a development plan had been submitted or approved. As no development plan was produced before the court, it was unable to grant a declaration that the defendant's proposed development had encroached into the plantiff's land (see paras 47–48).

[Bahasa Malaysia summary

Plaintif adalah pemajak kuari ('tanah') dan memperolehi pajakan 21 tahun daripada pihak berkuasa negeri untuk melombong tanah tersebut. Pelan ukur pembatasan sempadan untuk tanah tersebut telah diluluskan oleh Pengarah Ukur dan Pemetaan, Selangor ('PUPS') berikutan dengannya nombor lot baru diberikan kepada tanah tersebut dan kawasan memagari oleh sempadan-sempadannya dikira menjadi 128.6 hektar. Sementara itu, defendan telah menyerahkan kepada pihak-pihak berkuasa untuk kelulusan pelan untuk projek pembangunan perumahan ('projek') bersebelahan kepada tanah plaintif. Plaintif meminta defendan untuk menarik balik pelan pembangunan tersebut kerana ia menunjukkan projek tersebut akan menceroboh ke dalam bahagian selatan sempadan tanah tersebut. Semasa plaintif menjalankan kerja pelombongan di atas tanah tersebut, ia bimbang bahawa jika projek defendan diteruskan di sempadan tanpa zon penampan yang perlu, mata pencarian penduduk akan terjejas dan ini akan sebaliknya menjejaskan operasi kuari plaintif. Jawapan defendan kepada permintaan plaintif adalah bahawa pelan pembangunannya telah diluluskan dan bahawa sempadan-sempadan tanah tersebut tidak dimuktamadkan lagi. Plaintif memfailkan tindakan untuk perisytiharan bahawa (i) sempadan selatan tanah yang baru tersebut adalah seperti pelan ukur pembatasan plaintif seperti yang diluluskan oleh PUPS, dan (ii) pembangunan yang dicadangkan defendan menceroboh masuk ke dalam sempadan tanah tersebut. Plaintif juga memohon injunksi untuk menghalang defendan daripada meneruskan dengan projek tersebut.

Diputuskan, membenarkan permohonan:

(1) Seksyen 396 Kanun Tanah Negara ('Kanun'), terutamanya sub-s (2), menyatakan bahawa apa-apa pelan yang diluluskan oleh PUPS di bawah perenggan (e) sub-s (1) akan menjadi keterangan konklusif

A sempadan-sempadan, tanda-tanda sempadan dan kawasan tanah yang di mana ia dirujukkan dan adalah keterangan prima facie mengenai nombor lot tersebut (lihat perenggan 44).

(2) Meskipun fakta pihak berkuasa negeri mungkin meluluskan permohonan tanah defendan, kelulusan tersebut tidak akan menjejaskan pertukaran sempadan-sempadan tanah plaintif seperti yang diluluskan oleh PUPS (lihat perenggan 44).

(3) Memandangkan tiada keterangan dikemukakan oleh defendan untuk menunjukkan bahawa pelan ukur plaintif pernah dipinda oleh PUPS di bawah s 396A Kanun, pelan ukur akan menjadi pelan ukur authoritatif dan konklusif yang menetapkan sempadan-sempadan tanah plaintif (lihat perenggan 46).

(4) Pelan yang digunakan oleh defendan adalah pelan permohonan tanah dan bukan pelan pembangunan. Tidak terdapat keterangan kawasan yang dipertikaikan telah dipindahkan kepada defendan, dan juga tidak terdapat keterangan pelan pembangunan telah diserahkan atau diluluskan. Memandangkan tiada pelan pembangunan dikemukakan di hadapan mahkamah, ia tidak dapat memberikan perisytiharan bahawa pembangunan yang dicadangkan defendan telah menceroboh ke dalam tanah plaintif (lihat perenggan 47–48).]

Notes

For cases on encroachment on land, see 8(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 5377–5382.

Cases referred to

Lee Chow Kim v Pentadbir Tanah dan Daerah Gombak (Shah Alam High Court Saman Pemula No MT1–21–220 of 2007), HC (refd)

Wong Tai Moi (p) v Palaniammah d/o Kali Kavounder (Muar High Court Civil Suit No 22–43 of 2000);[2009] MLJU 1349, HC (refd)

Legislation referred to

Mineral Development Act 1994
Mineral (Selangor) Enactment 2000 s 63
National Land Code ss 92, 176, 189, 396, 396(1)(e), (2), 396A, 410

Sanjay Mohan (K Gobinanth with him) (Kadir, Andri & Partners) for the plaintiff.
CK Ng (Tan, Ng & Ong) for the defendant.

Amelia Tee Abdullah JC:

[1] The plaintiff, Associated Pan Malaysia Cement Sdn Bhd, had filed a writ of summons and statement of claim for:

(a) a declaration that the new southern boundary of the plaintiff's quarry

land is as per the plaintiff's demarcation survey plan approved by the Director of Survey and Mapping, Selangor on 24 January 2005;

(b) a declaration that the defendant's proposed development encroaches the boundary of the plaintiff's quarry land; and

(c) an injunction to restrain the defendant from proceeding with the proposed development pending the disposal of the declarative prayers.

[2] The plaintiff's claim is denied by the defendant, Westwood Development Sdn Bhd, on the basis that the defendant's plan and the boundaries therein had not been finalised. On the contrary, the defendant's case is that its application for Lot 21146, Lot 8 and Lot 3437 had been approved by the Majlis Mesyuarat Kerajaan Negeri Selangor Darul Ehsan on 13 October 2009.

THE PLAINTIFF'S CASE

[3] The plaintiff called a total of four witnesses in support of its case. Wong Kee Meng ('PW1') is the senior manager of the plaintiff in the quarry, land and property division. The plaintiff was at all times a lessee of the quarry located at ML 6 Lot 4222 Bandar Rawang, Daerah Gombak, Selangor for mining purposes under s 63 of the Mineral Enactment (Selangor) 2000. Vide a letter dated 26 April 2004, the Pejabat Tanah dan Galian Selangor Darul Ehsan had informed the plaintiff that its application for a mining lease had been approved by the Majlis Mesyuarat Kerajaan Negeri Selangor on 13 August 2003 for a period of 21 years, subject to conditions.

[4] PW1 testified that in 2004, upon the request of the State Government, the plaintiff had agreed to surrender part of the quarry land to the State Government for the purpose of subdividing into 132 units of bungalow lots to be applied for by the squatters of Rawang Tin Field Area ('RFTA').

[5] Vide a letter dated 21 July 2004; the plaintiff had submitted a demarcation survey plan of RFTA. The plaintiff had also proposed, inter alia, that the nearest house should be a minimum of 200 meters from the plaintiff's primary crusher and 145 meters away from the secondary crusher. According to PW1, this was agreed to by the Exco State Government on 21 July 2004 although he was unable to produce the said approval.

[6] What is pertinent is that the demarcation survey plan was subsequently approved by the Director of Survey and Mapping, Selangor on 21 January 2005 (CB1 p 3). According to PW1, the boundaries in pp 3 and 4 are the same as its surveyor had followed p 3 exactly. Page 3 is the official plan as approved by the survey department. It was after the approval on 24 January 2005 that the

lot number was changed to Lot 20146 with a size of 128.6 hectares. The plaintiff is in the process of obtaining a lease.

[7] During cross-examination, it was put to PW1 that the plaintiff does not have a proper boundary because the actual lease has not even been issued by the Pejabat Tanah dan Galian ('PTG'). To this, PW1 admitted that what the plaintiff has is an extraction permit renewed on a yearly basis. He offered the explanation that the lease is not yet out because the plaintiff had appealed to the PTG for changes to the fees and the PTG was taking time to discuss the appeal with all parties. Under the Mining Enactment, the amount of fees payable is 5% of the limestone market value which comes up to 60 sen per ton. The plaintiff had suggested RM3 per cubic meter which is RM1.66 per ton. In fact, since May 2004, it had been paying at the rate of RM3 per cubic meter. In 2010, the PTG had also requested the plaintiff to provide a rehabilitation plan which it had submitted in January 2011. PW1 testified that the plaintiff had not been guilty of inertia. During the period between 2004 and 2010, it had followed up with the PTG almost every quarterly on its appeal as regards the rate of payment. In the meantime, it had been paying at the proposed higher rate.

[8] Whilst in the process of fulfilling the requests of the PTG for obtaining the mining lease, the plaintiff had learnt that the defendant was seeking to develop a piece of land adjacent to the quarry land and had submitted a development plan for a housing development for squatters as well as the public. However the development plan submitted showed that the proposed development would trespass into the boundary of the plaintiff's quarry land.

[9] The plaintiff, through its solicitors wrote to the defendant on 4 November 2010 to withdraw the development plan as the proposed development would trespass into its boundary. The defendant's response was that the proposed development for a re-settlement project had been approved by the Majlis Mesyuarat Kerajaan Negeri Selangor ('MMKN') on 22 July 2009.

[10] On 7 January 2011, the Gombak Land Office had called for a meeting to discuss the defendant's development plan. At that meeting, the plaintiff again reiterated that the proposed development would trespass its boundary. According to PW1, all parties had acknowledged the encroachment issue raised by the plaintiff and that further confirmation was needed.

[11] The plaintiff's objection to the proposed development was in the interest of the residents and the public. As the plaintiff was carrying out mining works at the quarry land, its concern was that if the proposed development was allowed to proceed at the disputed boundary without the necessary buffer zone,

the residents' livelihood would be affected and this would, in turn, affect the plaintiff's operations at the quarry land. The plaintiff had no objections if the defendant builds as per the plaintiff's plan as it had already considered the buffers. Their main concern was that if the buffer belongs to the defendant, they may subsequently build on it.

[12] During cross-examination, PW1 was asked about the letter of authority to mine (P1) dated 19 January 2011 issued by the Jabatan Mineral & Geosains Selangor/Wilayah Persekutuan. The approval to mine has to be renewed on a yearly basis and it lays down the conditions under which the approval was granted. From a study of the conditions, it would appear that there were restrictions to mining to the north, east and west but no mention of restrictions to the south of the quarry.

[13] Learned counsel for the defendant had questioned PW1 as to his basis for saying where the boundary lies since the lease had not yet been issued. PW1's short answer was that it was based on the plan at p 3 of the CB1. However he agreed that the plan at p 3 of CB1 does not bear the endorsement of the MMKN.

[14] Mohd Kamil bin Mokhtar ('PW2') is a licensed land surveyor attached with roadland survey consultants with 18 years experience in the field. He testified that the plaintiff had requested him to draft a plan for the purpose of alienation of part of the quarry located at ML 6 Lot 4222 Bandar Rawang, Daerah Gombak to the Selangor State Government. He identified CB1 p 4 as the new southern boundary plan of the plaintiff's quarry land. PW2's plan is based on the approved plan by the land office at CB3 p 1. The area demarcated in purple on the plan was alienated to the State Government. As such, the new southern boundary of the land is now between the area coloured in purple and yellow. This new southern boundary was approved by the State EXCO Council of the State Government on 16 July 2003.

[15] PW2 explained that the plaintiff had requested him to draft the plan because it had wanted to confirm whether the new southern boundary of the plan in CB1 p 4 is similar to the southern boundary as approved by the Director of Survey and Mapping in CB1 p 3. Upon surveying both plans, he had found that the southern boundaries for both plans were identical. The court notes that this aspect of PW2's evidence had not be challenged or at all by the defendant. In the circumstances, the court finds that since the plan at CB1 p 3 was submitted by PW2 to the Director of Survey and Mapping Selangor on 24 January 2005 and approval was granted on 28 June 2005, and the southern boundary of the said plan is identical to that in CB1 p 4, it follows there from

that the new southern boundaries of the plaintiff's quarry land as set out in CB1 p 4 has been approved by the Director of the Department of Survey and Mapping Selangor.

[16] During cross-examination, PW2 had agreed that he had based his plan in CB1 p 4 prepared in August 2004 on a plan given to the plaintiff by the State Government, namely CB3 p 1 which was approved by the State Exco on 16 July 2003. The difference between the two plans is that CB3 p 1 is an incomplete plan in that it has no bearings and distances whereas his plan is complete. Further, the boundary between the yellow and purple portions in CB1 p 4 is not the same as the southern portion of the plan in CB3 p 1. He explained that the plan in CB3 p 1 was prepared by officers of the land office and that these officers do not have the expertise of land surveyors.

[17] The plaintiff's third witness was Datin Paduka Che Asmah bt Ibrahim ('PW3'), the Director of Selangor's Department of Environment. She enlightened the court as to the purpose of having a buffer zone in a housing development which is constructed close to a quarry land. A buffer zone should be maintained between the mining activity on the quarry land and the houses as well as between the crusher machines on the quarry land and the houses so that the residents would not be affected by the operations at the quarry.

[18] The department of environment requires that the buffer zone should be a minimum of 500 meters' distance between the crusher and the nearest house to be built.

[19] When referred to the plan found in CB2 p 1, PW3 testified that her department would not support any plan which does not incorporate a sufficient buffer zone. In cross-examination, she agreed that the said plan was approved by the *pentadbir tanah* on 11 February 2008 and was also approved by the MMKN on 5 August 2009.

[20] According to PW3, before approving a plan, the state would refer plans for industrial activity to her department for technical analysis although not necessarily for housing activity. In this case the plan in CB2 p 1 was *not* referred to her department. It was only in September/October 2010 that her department gave its comments to the state. They were called for several discussions and presented their views that the site was not suitable for housing development because it was too close to the crusher plant which was still in operation.

[21] The plaintiff's last witness was Mustaza bin Mustafa ('PW4'), the *Pegawai Galian* at the Jabatan Mineral dan Geosains Selangor/Wilayah

Persekutuan who has also been gazetted as a *penolong pengarah galian* under the Mineral Development Act 1994. He explained the purpose of having a buffer zone as follows:

> Zon Penampan adalah satu ruang atau jarak selamat yang perlu diwujudkan antara suatu industry dengan kejiranan yang ada disekelilingnya, yang praktikal dan munasabah, untuk menjaga keselamatan dan kesihatan mana-mana orang dan harta benda awam disekelilingnya.
>
> Dalam kes industri kuari, sebarang pembinaan projek perumahan berdekatan kuari, perlu mempunyai suatu ruang selamat (zon penampan) bagi menjaga kesihatan dan keselamatan penduduk daripada sebarang pencemaran habuk, bunyi bising, gegaran dan batu terbang, selaras dengan mana-mana peraturan sedia ada.

[22] PW4 also explained that whilst there is no specific provision as regards the length of a buffer zone for a housing development which is close to a crusher, however from experience and practice, the most suitable distance is 500 meters from where the quarry operations is taking place.

[23] PW4 had also explained why there was no mention of a buffer zone to the south of the quarry in Jabatan Mineral's letter dated 19 January 2011 (P1). He explained that the plaintiff's quarry had been in operation since the early 1960s at a time when there was no housing development in the vicinity. The defendant's proposed development to the south of the quarry was previously owned by the plaintiff under a mining lease. The existing houses thereon had been the quarters of the plaintiff's workers. However, the plaintiff had allowed the workers to stay on the land until a portion of the land was surrendered back to the State Government in 2004. He explained that the requirement for a buffer zone would only be made for a subsequent enterprise or industry at a particular site.

THE DEFENDANT'S CASE

[24] The defendant called two witnesses in support of its case. Syaflanza Azwan bin Shaiful Bahri ('DW1') is a *Penolong Pengarah, Bahagian Penguatkuasa* in the PTG, Selangor. He identified the plan at CB2 p 1 as the latest plan in the PTG's records.

[25] During cross-examination, DW1 agreed that the plan in CB2 p 1 is not a development plan. He admitted that he had not seen the development plan that was filed by the plaintiff. Although he was aware that the plaintiff had filed a development plan, he was not aware if the said plan had been approved.

[26] DW1 also agreed that he had seen the plan in CB1 p 3 and that the said plan which was prepared by a licensed land surveyor had been approved by the

Director of Survey and Mapping Selangor. He further agreed that until now there had been no change to the southern boundary of the said survey plan.

[27] DW1 was unable to give a satisfactory answer as to why there was a difference between the boundary in CB1 p 3 and CB 2 p 1, merely saying that they only had CB1 p 3. He initially claimed that he did not know if the plan in CB2 p 1 was approved by the Jabatan Tanah dan Galian. However when shown the endorsement on the plan, he agreed that the plan was approved by the MMKN.

[28] Nor Zaidi bin Ratiman ('DW2'), the *penolong pegawai daerah* with the Pejabat Tanah Gombak testified that the plan in CB2 p 1 *diakui oleh Pejabat Tanah*. When asked the same question as to why there is a difference between the boundary in CB1 p 3 and CB2 p 1, his answer was a rather puzzling *Pelan-pelan lain kerana lain orang yang tulis*. According to him, the PTG would only acknowledge such plans as are approved by the MMKN. For alienation of land, the PTG would only acknowledge only those plans with the endorsement of the MMKN.

THE ISSUES

[29] Since the plaintiff is applying for declarations in relation to the southern boundary of its quarry land, the issues for determination are:

(a) Where the southern boundary of the plaintiff's quarry land? and

(b) Does the defendant's proposed development encroach into the plaintiff's quarry land?

EVALUATION AND FINDINGS

[30] In coming to a decision in this case, the court has carefully considered the evidence adduced by both parties, paying special attention to the documentary evidence tendered. The court has also derived considerable assistance from the written submissions prepared by learned counsel after the hearing.

[31] The defendant submits that the burden of proof is on the plaintiff to show that it is the owner of Lot 20146, Lot 8 and Lot 3437. The court does not agree that this is so. The declarations sought by the plaintiff are as regards the southern boundary of the plaintiff's quarry land and whether the defendant's proposed development will encroach into it. As such, the issue of proving *ownership* of the said lots does not arise.

[32] It is not in dispute that the plaintiff was a lessee of the quarry land

located at ML 6 Lot 4222 Bandar Rawang, Daerah Gombak, Selangor for mining purposes under s 63 of the Mineral Enactment (Selangor) 2000. It is also not in dispute that the Majlis Mesyuarat Kerajaan Negeri Selangor had on 13 August 2003 approved the plaintiff's application for a mining lease for a period of 21 years, subject to conditions. This is reflected in the PTG Selangor letter dated 26 April 2004 at pp 8–12 of CB1.

[33] The court further accepts the evidence of PW1 that the plaintiff had, upon the request of the State Government, agreed to surrender part of the quarry land for the purpose of development into housing to be applied for by the squatters of Rawang Tin Field Area ('RTFA'). The plaintiff had then submitted a demarcation survey plan. This can be seen in the letter dated 21 July 2004. The court notes that PW1 was never cross-examined or at all on this aspect of his evidence.

[34] The demarcation plan submitted by the plaintiff is the plan found at CB1 p 3. The plaintiff had also proposed that the nearest house be a minimum of 200 meters from the plaintiff's primary crusher and 145 meters away from the secondary crusher. Was this plan approved?

[35] The court notes PW1's evidence that this plan was agreed to by the Exco State Government on 21 July 2004 although he was unable to produce the said approval. The court is of the considered view that more important and pertinent is the approval of the Director of Survey and Mapping which approval given on 26 August 2005 as can be seen at the bottom left hand corner of CB1 p 3. What then is the significance of this approval of the Director of Survey and Mapping?

[36] Section 396 of the National Land Code reads as follows:

(1) For the purposes of this Act, land shall not be taken to have been surveyed until —

(a) its boundaries have been determined by right-lines;

(b) its boundaries as so determined have been demarcated on the surface of the land by boundary marks or, if by reason of the configuration thereof or for any other cause the placing of boundary marks on the actual line of the boundary is to any extent impossible or impracticable, boundary marks have been so placed as to enable that line to be ascertained;

(c) the area enclosed by its boundaries as so determined has been calculated;

(d) a lot number has been assigned thereto by the Director of Survey; and

(e) a certified plan, showing the situation of the land, the position of its

A boundaries as so determined and of the boundary marks placed thereon and the area and lot number thereof, has been approved by the Director of Survey.

(2) *Any plan approved by the Director of Survey and Mapping* under paragraph (e) of sub-section (1) shall be filed in his office, and (without prejudice to the operation of section 49 in the case of land subsequently affected by any advance of the shore-line or of the bed of any river) *shall be conclusive evidence of the boundaries, boundary marks and area of the land to which it refers and prima facie evidence of the lot number thereof.* (Emphasis added.)

[37] Based on a careful perusal of CB1 p 3 and the approval of the Director of Survey and Mapping thereon, the court has no hesitation in finding that the boundaries of Lot 20146 as found in the plan had been approved by the Director of Survey and Mapping.

[38] The court has also noted the evidence of PW2 that he had drafted the plan in CB1 p 4 and that the boundaries of this plan is *identical* to the boundaries in CB1 p 3 which had been approved by the Director of Survey and Mapping.

[39] The court cannot overly stress the importance of the approval of the Director of Survey and Mapping. In *Wong Tai Moi (p) v Palaniammah d/o Kali Kavounder* (Muar High Court Civil Suit No 22–43 of 2000); [2009] MLJU 1349 the issue that arose was whether the defendant had committed trespass of the plaintiff's land. The plaintiff contended that prior to the approval for subdivision of the land; the late S Kalimuthu had constructed a permanent dwelling house and planted trees and hedges on the portion of land belonging to the plaintiff. On the other hand, the defendant had contended that there was a mistake in the land survey and that the survey was done in total disregard for the instructions of the late S Kalimuthu, thus resulting in his being deprived of that acreage of land on which his house now intruded into the plaintiff's land.

[40] The High Court, in ordering the defendant to end the trespass, held as follows:

> The law is clear. Under s 396(2) of the National Land Code, any plan approved by the Director of Survey and Mapping shall be conclusive evidence of the boundaries and boundary marks of the land to which it refers, and of the area and lot number thereof. In this regard I am with learned counsel for the plaintiff's submission that when the three landowners appointed *Syarikat Juruukur Malaysia* to do the needful, the surveyor became in law their agent for submitting the plan to the land authority. The defendant is now estopped from complaining about the surveyor since that is a matter between the defendant and the surveyor — *Yap Lai Yoke v Chin Fook Wah* [1984] 2 MLJ 274. As far as the plaintiff is concerned, *the defendant cannot question*

the conclusiveness of the plan approved by the Director of Survey and Mapping under s 396(2) of the National Land Code. (Emphasis added.)

[41] In the case of *Lee Chow Kim v Pentadbir Tanah dan Daerah Gombak* (Shah Alam High Court Saman Pemula No MT1–21–220 of 2007), the issue that arose was the determination of the size of the plaintiff's land, whether it was 7800 sq ft or 4064 sq ft. In that case, Dato' Zaleha Yusof JC (as Her Ladyship then was), after referring to ss 176, 92, 189 and 410 of the National Land Code had this to say:

> Peruntukan-peruntukan di atas menunjukkan pemilikan tanah hakmilik sementara adalah tidak boleh disangkal tertakluk kepada sempadan yang ditunjukkan dalam dokumen hakmilik itu sahaja kecuali telah ditentukan oleh ukuran yang lebih awal. Adalah tidak dapat dinafikan bahawa mengikut pelan lakar dalam eksh A2 di kandungan (6), ukuran yang telah disahkan oleh pihak Jabatan Ukur ialah 0.093 ekar/377.621 meter persegi yang bersamaan dengan 4064 kaki persegi. Jadi, *saya bersetuju bahawa berdasarkan kepada s 396 (2) KTN, hanya pelan yang telah diluluskan oleh Jabatan Ukur dan Pemetaan yang merupakan pelan yang diakui sebagai muktamad*, maka tidak diragui bahawa dari segi undang-undang, nampaknya ukuran tanah plaintiff sebenarnya hanya 4064 kaki persegi. (Emphasis added.)

[42] The defendant has placed much emphasis on the fact that the plaintiff does not have title to the quarry land. The court finds that the issue of title should not be allowed to sidetrack the fact that the plaintiff is not claiming title but is seeking a declaration as regards the boundary of the quarry lands in which it has an interest being a lessee holding a licence to mine on the said quarry lands. The court finds that the plaintiff's licence to mine is for a specified location namely *Di ML 6 Lot 4222 seluas 141 Hektar (348.38 Ekar), Lot 266 seluas 0.6 Hektar (1.48 Ekar) dan tanah kerajaan seluas 1 Hektar (2.47 Ekar) Mukim Rawang Daerah Gombak* in the letter from PTG dated 26 April 2004. As a party which has been given a right to mine on the quarry land, the plaintiff would be entitled to apply for a declaration as to the boundaries of the said quarry lands notwithstanding its lack of title to it.

[43] The defendant, in asking the court to accept CB2 p 1 as the authoritative survey plan, argues that the said plan *telah diakui dan sempadan-sempadan tanah tersebut juga dikenalpasti oleh Pejabat Daerah dan Tanah Gombak di Majlis Mesyuarat Kerajaan Negeri Selangor pada 5 Ogos 2009*. The court has carefully perused CB2 p 1 in light of the law as has been outlined earlier. The court finds it clear that the said plan was submitted for the purpose of a land application. The applicant is the defendant. The court notes that in the third box on the right it is stated that the plan had been approved at the *Mesyuarat MMK* on 5 August 2009. The rubber stamp and entry of the Pentadbir Tanah Gombak is merely to the effect that the plan is in relation to

his letter 'Bil (1A) dalam PTG 2/2/631 tahun 2007 dated 11 February 2008'. This letter of the PTG dated 11 February 2008 was not produced in evidence before the court. In its absence the court is unable to conclude that the said stamp of the *Pentadbir Tanah Gombak* denotes approval of the boundaries thereon.

[44] In light of the provisions of s 396 of the National Land Code 1965 and especially sub-s (2) thereof which states that any plan approved by the Director of Survey and Mapping under para (e) of sub-s (1) *shall be conclusive evidence* of the boundaries, boundary marks and area of the land to which it refers and prima facie evidence of the lot number thereof, the court is constrained to find that notwithstanding the fact that the MMKN may have approved the defendant's land application, the said approval would not have the effect of changing the boundaries of the quarry land as had been approved by the Director of Survey and Mapping.

[45] The court finds that the plan in CB1 p 3 is the plan that was approved by the Director of Survey and Mapping on 28 June 2005. The date 24 January 2005 is not the date of approval of the Director of Survey and Mapping but merely the date of submission of the said plan by PW2 as a licensed land surveyor.

[46] No evidence has been adduced by the defendant to show that the plan in CB1 p 3 had ever been amended by the Director of Survey and Mapping under s 396A of the National Land Code. In the absence of any such evidence the court finds that the survey plan as in CB1 p 3 would be the authoritative and conclusive survey plan which sets out the boundaries of the plaintiff's quarry land.

[47] The court further notes that the title of the plan in CB2 p 1 relied upon by the defendant is a *Pelan Pemohonan Tanah* or land application plan. The court would agree with counsel for the plaintiff that this is not a development plan although the project is described as a project for the resettlement of the Kampung Rawang Tin squatters. There is no evidence that the area in dispute has yet been alienated to the defendant. Neither is there evidence that a development plan had been submitted or approved. In the main, the defendant is only relying on CB2 p 3.

[48] Accordingly the court finds that the plaintiff is entitled to the declaration sought in prayer (i) except that the date '24 January 2005' should read as '28 June 2005'. In respect of prayer (ii), since no development plan was ever produced before the court, the court is unable to grant a declaration that the defendant's proposed development encroaches into the boundary of the plaintiff's quarry land. However, the court is prepared to say that any

development by the defendant that encroaches into the southern boundary of the plaintiff's demarcation survey plan as approved by the Director of Survey and Mapping would constitute an encroachment into the boundary of the plaintiff's quarry land. The court awards costs against the defendant. Costs are to be taxed unless otherwise agreed between the parties.

Prayer allowed.

Reported by Ashok Kumar